

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

GUARDIAN INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	CIVIL NO. 1996-180
)	
BAIN HOGG INTERNATIONAL LIMITED)	
and EAGLE STAR REINSURANCE COMPANY)	
LIMITED,)	
)	
Defendants.)	
_____)	

APPEARANCES:

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Hodge & Francois
1340 Taarneberg
St. Thomas, U.S.V.I. 00802
Attorney for Plaintiff

Simone R.D. Francis, Esq.
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Attorney for Defendant Bain Hogg International Limited

MEMORANDUM OPINION

Finch, C. J.

This matter comes before the Court on Defendant Bain Hogg International Ltd.'s ("HIB")¹ Motion for Summary Judgment on Count V of the Amended Complaint. For the

¹ Defendant asserts, and Plaintiff does not contest, that HIB Limited and not Bain Hogg International Limited is the proper name for the party to this action. Therefore, Defendant shall be referred to as HIB.

reasons expressed below, the Court will stay HIB's motion pending the completion of discovery.

I. Background

Guardian is a Virgin Islands insurer. HIB is a British reinsurance broker engaged in obtaining reinsurance on behalf of insurers for risks exceeding the financial level manageable by primary insurers. Eagle Star Reinsurance Company ("Eagle Star") is a reinsurer whose primary place of business is London, U.K. In early 1993, Guardian and HIB entered into an oral agreement by which HIB was to serve as Guardian's reinsurance broker. Pursuant to this agreement, in December 1993, HIB issued a Cover Note to Guardian and its Puerto-Rico based affiliate, Heritage Insurance Co. Ltd. ("Heritage"). This Cover Note confirmed that HIB had placed reinsurance coverage with Eagle Star under a First Surplus Property Treaty (the "Treaty") covering risks insured by Guardian within the U.S. Virgin Islands, and by Heritage within the British Virgin Islands and the Lesser Antilles.

According to Eagle Star, it issued a provisional notice of cancellation of the reinsurance policy on September 20, 1993. Guardian disputes ever receiving the notice. HIB forwarded Guardian a Cover Note on December 29, 1993, together with a letter advising Guardian that the Treaty was for the period January 1, 1993 to December 31, 1993. Guardian made no cessions under the Cover Note until 1995, following Hurricane Marilyn. At that time, Guardian attempted to cede risks to Eagle Star by filing with HIB a series of statements and a check for premiums due Eagle Star. HIB accepted the statements and deposited the check. However, HIB subsequently sought to refund the premiums and informed Guardian that the Treaty had been canceled effective December 31, 1993.

HIB then applied for and received from the High Court of Justice in London an order

dated August 22, 1996, permitting service of a summons on Guardian, Heritage, Eagle Star Insurance Company and Eagle Star Reinsurance Company. On September 3, 1996, Guardian filed the instant action against both HIB and Eagle Star, alleging breach of contract, breach of fiduciary duty and bad faith. Shortly thereafter, HIB filed a separate action in the Queens Division, Commercial Court of London (“Commercial Court” or “English Court”), seeking declaratory judgment that HIB was not liable to Guardian for breach of any duty.

On April 27, 1997, the Commercial Court conducted a trial on the issue. Although Guardian chose not to participate in the trial, the English Court reviewed the evidence before it and granted judgment in favor of HIB holding that it had not breached any duties owed to Guardian and that, in any event, Guardian did not suffer any loss as a result of any alleged breach. Under British law, Guardian had four weeks after the entry of judgment to file an appeal. It did not do so.

On June 9, 1999, this Court held that the doctrine of *res judicata* barred Guardian from pursuing its claims for breach of contract and breach of fiduciary duty against HIB, because those claims are identical to those decided by the English Court. In so holding, this Court concluded that Guardian’s bad faith tort claim against HIB was not barred by the doctrine of *res judicata* because such a claim could not have been raised in the English proceeding. Specifically, the English Court refused to hear Guardian’s claim of bad faith asserted under 22 V.I.C. § 1 because it is a claim not recognized by English law.

HIB now moves for summary judgment on the bad faith tort claim: Count V of the complaint. HIB argues that because Guardian’s bad faith claim must be premised on a breach of a duty owed to HIB — which, according to HIB, the English Court expressly found did not occur

— that claim is foreclosed by the doctrine of issue preclusion. Guardian submits three arguments in its opposition to HIB’s motion. First, Guardian argues that summary judgment is premature at this stage of the proceedings, because discovery is not complete and genuine issues of material fact exist. Second, Guardian claims that HIB does not meet all of the criteria needed to invoke the doctrine of issue preclusion, and that even if it did, exceptions to the rule of issue preclusion are present in this case. Finally, Guardian argues that HIB misunderstands the cause of action asserted against it.²

II. Discussion

A. Additional Discovery — Fed. R. Civ. P. 56(f)

Guardian argues that this case is not ripe for entry of summary judgment because it has not had the opportunity for discovery on the merits. Fed. R. Civ. P. 56(f) sets out the procedure to be followed by the non-movant when opposing a summary judgment motion on the basis of deficient discovery. Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

The Third Circuit has interpreted Rule 56(f) as requiring the party seeking further discovery in response to a summary judgment motion to submit an affidavit specifying: (1) what particular information is sought; (2) how, if uncovered, the information would preclude summary judgment;

² Because the Court finds that summary judgment is premature at this stage of the pleadings, it will not address Guardian’s or HIB’s arguments regarding the merits of the summary judgment motion.

and (3) why the information has not previously been obtained. Pastore v. Bell Telephone Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994); Dowling v. Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988).

Furthermore, “[w]here Rule 56(f) affidavits have been filed, setting forth specific reasons why the moving party’s affidavits in support of a motion for summary judgment cannot be responded to, and the facts are in the possession of the moving party, [the Third Circuit has] held that a continuance of the motion for purposes of discovery should be granted almost as a matter of course.” Mid-South Grizzlies v. National Football League, 720 F.2d 772, 779 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984) (citations omitted); see also St. Surin v. Virgin Islands Daily News Inc., 21 F.3d 1309, 1314 (3d Cir. 1994). However, the Third Circuit noted that the reasons offered by the party opposing the summary judgment motion must be “genuine and convincing to the court rather than merely colorable.” Mid-South Grizzlies, 720 F.2d at 779.

_____ B. The Fed. R. Civ. P. 56(f) Affidavit

In the instant case, Guardian has submitted a Fed. R. Civ. P. 56(f) Affidavit (the “Affidavit”) that it argues meets the above criteria. First, Guardian claims that the Affidavit specifies the particular information sought. The Affidavit provides, in relevant part:

Guardian requires discovery, both written and oral, regarding, among other matters: 1) why there is no record of the transmittal [of] Eagle Star’s alleged provisional notice of cancellation from Bain Hogg to Guardian; 2) the reasons for Bain Hogg’s failure to transmit the provisional notice to Guardian in a timely fashion; 3) whether the said provisional notice was lost by Bain Hogg and untimely submitted to Bain Hogg; 4) the reasons Guardian never received a final notice of cancellation; 5) whether Bain Hogg was forced to obtain another copy of the alleged provisional notice from Eagle Star almost two years later to satisfy Guardian’s inquiries; 6) whether Bain Hogg ever transmitted to Guardian any provisional or final notice of cancellation of the Eagle Star reinsurance treaty, and whether or not such notices were ever received by Guardian; 7) whether both reinsureds under a reinsurance treaty must receive notices of cancellation; 8) whether Bain Hogg had previously had within its possession sufficient information from Guardian

regarding its aggregates; and 9) if so, why did was [sic] such information not transmitted to Eagle Star.

Affidavit at 2.

Second, Guardian argues that the Affidavit sets forth how the requested information, if discovered, would preclude summary judgment in HIB's favor. Specifically, the Affidavit states that "[t]he facts to be gained from the aforesaid discovery and fleshing out of said issues would demonstrate that, not only should Guardian be allowed to proceed with its remaining claims against [HIB], but that [HIB] violated its duties under Virgin Islands law to Guardian, and, therefore, Guardian should prevail on the merits of its claims." Id.

Third, Guardian argues that the Affidavit provides why the necessary information has not been previously obtained. The Affidavit states that per Magistrate Barnard's Order, discovery was limited to "jurisdictional issues and matters raised in [HIB's] motion for summary judgment," and that "no further discovery orders have been issued by this Court which expand the scope of discovery to the merits of this case." Id.

HIB argues that Guardian has only enumerated the information it intends to seek, but has failed to satisfy the remaining two requirements identified by the Third Circuit for obtaining a continuance. First, HIB claims that Guardian's explanation for its failure to obtain information it allegedly requires is neither genuine nor convincing. HIB claims that although the Magistrate's December 15, 1997 Order did limit discovery, Guardian has made no effort since June 9, 1999, when this Court decided the first summary judgment motion, to obtain additional discovery. HIB argues that it was incumbent upon Guardian, as the party desiring discovery, to request a scheduling conference or an order of clarification. Since Guardian has not done so, HIB contends that Guardian should not be permitted at this late stage to argue that HIB's motion is premature.

Second, HIB argues that even if Guardian could supply a convincing reason for its failure to conduct discovery, this Court should not permit a continuance because the pleadings reveal that additional discovery would not assist in adjudicating the issues of law raised by HIB in its motion. HIB claims that the legal issues that were litigated in the English proceedings can be determined from the pleadings. Further, HIB contends that because the pleadings demonstrate that one or more issues necessary to Guardian's bad faith claim was litigated and resolved in HIB's favor, summary judgment should be granted.

The Court is not persuaded by HIB's arguments. Further, the Court finds that Guardian's Affidavit satisfies the requirements of Fed. R. Civ. P. 56(f) as interpreted by the Third Circuit. Therefore, the Court will grant Guardian's request for a continuance of HIB's Motion for Summary Judgment pending the completion of discovery.

III. Conclusion

In accordance with the attached Order, HIB's Motion for Summary Judgment is stayed pending the completion of discovery.

ENTER:

DATED: March ____, 2000

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:

Orinn F. Arnold
Clerk of Court

by: _____
Deputy Clerk

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ORDER

Presently before the Court is Defendant HIB's Motion for Summary Judgment. For the reasons stated in the attached Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is **STAYED** pending the completion of discovery.

ENTER:

DATED: March ____, 2000

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:

Orinn F. Arnold
Clerk of Court

by:

Deputy Clerk

cc: Adam C. Christian, Esq.
Simone R.D. Francis, Esq.